

October 8, 2004

Via Email and U.S. Mail

Ms. Joyce Howard  
NOAA Fisheries  
525 NE Oregon St., Suite 5000  
Portland, Oregon 97232

Re: NIU/NRU Comments on 2004 Draft BiOp

Dear Ms. Howard:

I am the Executive Director of the Northwest Irrigation Utilities (NIU) and the Chief Executive Officer of Northwest Requirements Utilities (NRU). These utilities purchase almost all of their power supply requirements from the Bonneville Power Administration (BPA). Such long-term power purchases compliment and are directly linked with the welfare of Columbia and Snake River fish and the wise management of the Federal Columbia River Power System (FCRPS) resources. Thus, we are interested in seeing healthy salmon runs in the Columbia and Snake Rivers and tributaries. As well, we are keenly interested in the operations of the FCRPS and in finding cost-effective solutions to Endangered Species Act (ESA) compliance.

Resultingly, NIU and NRU offer the following comments with respect to the September 9, 2004, Draft Biological Opinion (2004 Draft BiOp). Generally speaking, we applaud the efforts NOAA and the action agencies have made to improve upon the underlying 2000 BiOp. The 2004 Draft BiOp appears to produce benefits to listed fish that exceed the benefits to these same fish when compared to the 2000 BiOp; and may produce much needed economic relief for electricity consumers that rely upon BPA as their wholesale power supplier.

Our comments recognize that NOAA first and foremost wants to hear from its ESA “co-managers”, the states and tribes, concerning the 2004 Draft BiOp. As such, we will be brief and summarize key issues and areas arising from the 2004 Draft BiOp.

### ESA and Northwest Power Act Framework

The federal government’s responsibility for environmentally sound stewardship of the resources of the Columbia and Snake Rivers is not isolated within the exclusive domain of ESA considerations. Rather, the government’s responsibilities to protect, mitigate and enhance fisheries are interwoven with its obligations to supply adequate, reliable and economic electric power, for distribution to local consumers in the Northwest.

NIU and NRU utilities encourage NOAA and the federal action agencies to keep these multiple responsibilities in sight, when considering a draft biological opinion concerning operation of the FCRPS. The ESA cannot be implemented in isolation, and instead must be implemented so as to compliment, or at a minimum, not to interfere with, the federal government’s obligations under concurrent statutes such as the Northwest Power Act.

Taken together, the ESA and the Northwest Power Act must address the interests of Columbia and Snake River natural resources, including species listed under ESA, and other statutorily protected interests including power generation. This pairing of legal obligations is key to NIU and NRU utilities, because power produced by FCRPS dams comprises the overwhelming majority of electric power marketed by BPA. To wit: under the streamflow guidelines of the 2000 BiOp, an annual average of 80% of BPA’s firm capacity and 91% of its sustained peak capacity is presently generated from the FCRPS projects. Thus the FCRPS is the primary source of wholesale electric power purchased by NIU and NRU utilities and by other BPA customers on behalf of their consumers.

For most NIU and NRU utilities, there is no economically feasible substitute for the power produced by FCRPS projects and marketed by Bonneville. More importantly, these utilities have “Full Requirements” power supply contracts with BPA that require them to purchase all of their energy supply from BPA for the duration of those contracts, through September 30, 2011. Even if these utilities had a contractual ability to secure non-BPA power to serve all or portions of their loads, there are currently transmission constraints that financially preclude such action.

As such, NIU and NRU utilities will continue to make long-term and substantial investments in conserving and recovering populations of the listed species, through their wholesale power rates paid to BPA. Such investments include payment for a significant portion of the increased FCRPS costs resulting from changes to hydropower operations to benefit the listed species; and for state, federal and tribal initiatives to benefit the listed species, including fish and wildlife measures in research, conservation measures, habitat and hatchery enhancements.

### Flexible, Comprehensive Plan

After nearly two and one-half decades of experience under the Northwest Power Act and the ESA, NIU and NRU utilities believe that increases in the populations of listed species to agreed upon levels over a sustained period of time, consistent with a regionally developed plan that complies with statutory requirements, will assure us of continued access to stable, dependable and economical hydropower supply. As such, both organizations have an interest in a broad-based regional recovery plan that includes sub-basin plans and an integrated strategy that takes into account all aspects of the lifecycle of fish populations.

The 2004 Draft BiOp offers such a programmatic plan, because it covers ongoing operations of multiple existing facilities by several different federal action agencies over an extended period of time. The utilities of NIU and NRU believe that this approach better serves ESA goals. However, there should be utter clarity that proposed actions under the final 2004 BiOp may flexibly change from year-to-year, based on new data and new analysis, as well as previous years' operations and performance. We support measurable, achievable performance standards as part of an "adaptive management" framework that will permit adjusted actions as necessary to respond to new information.

### Jeopardy Analysis Framework

Particularly in light of the multiple demands created by the statutory framework described above, NIU and NRU utilities are sensitive to the distinction between the recovery plans for the benefit of the listed species, and the jeopardy analysis arising from section 7(a)(2) of the ESA. Appropriately, the 2004 Draft BiOp also recognizes such a distinction.

The 2000 BiOp adopted a framework that confused a jeopardy analysis with a recovery analysis. This blurred the action agencies' separate obligations to avoid jeopardy under ESA section 7(a)(2) on the one hand, and contribute to recovery of

species under ESA section 7(a)(1) on the other. Thus, the 2000 BiOp adopted programs to achieve recovery, rather than to avoid jeopardy. The 2004 Draft BiOp clarifies these two different legal obligations, and thus is an improvement over the 2000 BiOp.

As well, the 2004 Draft BiOp improves the jeopardy analysis framework over that incorporated in the 2000 BiOp because, consistent with Judge Redden's order, it addresses only those actions that the federal agencies can control. For example, the federal agencies operate the dams only; they have no legal authority to remove dams. Moreover, the 2004 Draft BiOp framework is an improvement over the 2000 BiOp because it clarifies that existing and operating federal dams are part of the environmental baseline. We agree that the new BiOp was correct to "distinguish the effects of the proposed future operation of the projects from its past construction and operation." P. 1-9.

#### Best Available Science

The 2004 Draft BiOp is an improvement over the 2000 BiOp because it relies on the most current data regarding adult salmon returns. Recent trends indicate an increase in returning adult salmon populations, and this should correctly be incorporated in the new BiOp. Therefore, we support reliance on salmon run data from 1994 through 2003.

Although NIU and NRU utilities have a strong interest in a biologically effective opinion, we are simultaneously interested in *cost*-effective investments in recovery of listed FCRPS species. The 2004 Draft BiOp appears to satisfy the first concern, by improving the survival rate of listed and non-listed species when compared to the survival rates for these species of the 2000 BiOp. As well, the 2004 Draft BiOp partially satisfies the second concern in that it achieves this result at a lower overall cost than the 2000 BiOp.

#### Cost-Effective Measures

Through the rates they pay for power supplies from BPA, the utilities of NIU and NRU have contributed to the funding of salmon recovery efforts for nearly 25 years. However, the direct costs of funding fish restoration activities such as those provided in the 2000 BiOp are not the only costs of ESA-listed fish restoration. Foregone power production is a cost also borne by the region. Alterations to the operation of the FCRPS in an attempt to benefit the listed species, such as increases in voluntary spill, flow augmentation, drawing down reservoirs and changing the timing of water flowing through hydroelectric facilities, reduce the amount of power produced by the FCRPS

hydroelectric generation projects. Reduction in hydroelectric power production by the FCRPS forces BPA to purchase nonfederal power at market prices to fulfill its statutory and contractual obligations, or to forego revenue that could have been achieved if the hydroelectric power production were sold.

NIU and NRU utilities support efforts to address any gaps in the jeopardy analysis, and any recovery plans, in the most cost-effective manner possible. Indeed, we believe that “cost-effectiveness” should be one of the major factors in choosing actions to close the jeopardy gap, in light of the just-described range of costs directly associated with the listed species.

Additionally, NIU and NRU urge that the final BiOp clarify that the FCRPS action agencies are not obligated to mitigate for, or to fund mitigation of, impacts caused primarily by non-FCRPS programs or causes for which they have no responsibility, such as agriculture, forestry, mining or urban development. As well, if actions are not credited towards filling the jeopardy gap, then BPA customers should not be required to fund them.

### Summer Spill

In the summer of 2004, NIU and NRU supported the federal action agencies’ proposed modifications to summer spill as a constructive, even if very conservative, step in the right direction to achieve a more scientifically based and biologically sound recovery program that gives consideration to cost effectiveness. Such adjustments were compelling and in the public interest, particularly at a time when the regional economy was struggling and could have been aided by reduced power costs.

That said, on a forward-going basis the generation output of the FCRPS resources can be expanded by the curtailment of spill programs or flow augmentation that have negligible demonstrable value for listed species. Portions of the additional revenues from power production can then be reinvested into programs, including habitat restoration, that have the greatest likelihood of helping listed species based upon the best scientific information. In the analysis the federal agencies undertook beginning in 2003, it was clear that summer spill is not a cost-effective mitigation action. It is hugely expensive to the region in terms of lost revenue from power generation, and it appears to have insignificant biological benefit. The action agencies should abandon summer spill as a mitigation measure in the final 2004 BiOp.

In summary, the welfare of anadromous fish and the wise management of the Federal Columbia River Power System are directly linked and related to other statutorily protected interests. NIU and NRU utilities' ability to conduct business, their employees' welfare, and the welfare of the communities they serve, are each affected by the 2004 Draft BiOp, given the multiple uses of public waterways such as the Columbia and Snake Rivers and the interconnected statutory framework. The 2004 Draft BiOp represents an improvement over its predecessor, both legally and biologically. We look forward to working with you toward implementation of the 2004 BiOp.

We appreciate the opportunity to submit these comments.

Very truly yours,

/S/

John D. Saven

Cc: Members of NIU  
Members of NRU